UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Arkansas Electric Cooperative Corporation
v. Docket No. EL05-15-000
Entergy Arkansas, Inc.

East Texas Electric Cooperative, Inc.
v. Docket No. EL04-134-000
Entergy Arkansas, Inc.

ORDER ON COMPLAINT ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES AND CONSOLIDATING PROCEEDINGS

(Issued December 22, 2004)

1. In this order we establish hearing and settlement judge procedures to address Arkansas Electric Cooperative Corporation's (Arkansas Electric) complaint against Entergy Arkansas, Inc. (Entergy Arkansas) and consolidate the proceeding with the proceeding in Docket No. EL04-134-000. Arkansas Electric complains that Entergy Arkansas has unilaterally changed the method of classifying and pricing energy under the Power Coordination and Interchange and Transmission Service Agreement (Interchange Agreement) between Arkansas Electric and Entergy Arkansas without filing with the Commission.

2. Entergy Arkansas responds that it has honored the terms of its agreements with Arkansas Electric and that it has not imposed an unauthorized rate increase on Arkansas Electric. Entergy Arkansas claims that there is no relationship between the energy crediting methodology and anticompetitive behavior. This order benefits customers because it provides the parties with a forum in which to resolve their dispute over Entergy Arkansas' charges for energy.

I. Background

3. Arkansas Electric is an electric generation and transmission cooperative incorporated under Arkansas law. Arkansas Electric provides wholesale electricity to its sixteen electric distribution cooperative members. Entergy Arkansas is an investor-owned electric utility organized under the laws of the State of Arkansas.

4. Arkansas Electric is a co-owner, with Entergy Arkansas and others, of the Independence Steam Electric Station (ISES) located in Newark, Arkansas. Arkansas Electric has a 35 percent interest in coal-fired units ISES 1 and 2. Arkansas Electric is also a co-owner, with Entergy Arkansas and others, of the White Bluff Steam Electric Station (White Bluff) located near Redfield, Arkansas. Arkansas Electric has a 35 percent interest in coal-fired units White Bluff Unit 1 and White Bluff Unit 2. The four units are subject to automation generation control by Entergy Arkansas.

5. The manner in which Entergy Arkansas operates and charges Arkansas Electric for energy from Arkansas Electric's ownership shares of White Bluff and ISES is governed by five agreements: the Interchange Agreement (entered into June 27, 1977 and restated on October 1, 2001); the White Bluff Plant Ownership Agreement, as amended (entered into June 27, 1977); the White Bluff Plant Operating Agreement, as amended (entered into June 27, 1977; the ISES Ownership Agreement as amended (entered into July 31, 1979); and the ISES Operating Agreement (entered into July 31, 1979 and restated effective November 1, 2000).

II. Complaint

6. On October 25, 2004, Arkansas Electric filed a complaint against Entergy Arkansas contending that Entergy Arkansas has unilaterally changed the method of classifying and pricing energy, from four co-owned coal fired units, under the Interchange Agreement between Arkansas Electric and Entergy Arkansas. Arkansas Electric claims that Entergy Arkansas' actions violate the terms of the agreement and the filed rate doctrine and are anticompetitive.

7. Arkansas Electric states that since August 1980, when the first of the units went into commercial operation, through June 2004, Entergy Arkansas, with minor exceptions, credited Arkansas Electric its ownership share of the total capability of White Bluff and ISES without consideration of how Entergy Arkansas actually operated these plants. Arkansas Electric states that pricing of energy associated with the co-owners' share of the capacity has been based on the cost of the plants' fuel inventory. Arkansas Electric states that the pricing of substitute energy, energy assumed to be generated by the units, has been identical to the price that the co-owners would pay for the energy generated by the coal units themselves ($14.08/MWh in June 2004). Arkansas Electric states that if

Entergy Arkansas provided replacement energy (energy that exceeds installed capacity) to Arkansas Electric, Entergy Arkansas charged a price based on Entergy Arkansas' incremental production cost or the price of energy purchased by Entergy Arkansas ($58.65/MWh in June 2004).

8. At a meeting on June 23, 2004, Arkansas Electric states that it learned that, effective July 1, 2004, Entergy Arkansas would no longer base billing on the coal units' physical capability. Instead, it asserts, Entergy Arkansas would limit the plants' capabilities deemed "available" to Arkansas Electric to the actual generation outputs as determined by Entergy Arkansas to meet system load. According to Arkansas Electric, when this effective reduction of Arkansas Electric's owned capacity diminishes its resources to a level below its load requirements Entergy Arkansas will charge Arkansas Electric for replacement energy. The only exception would be when Entergy Arkansas limited actual generation outputs of the units for economic reasons. Arkansas Electric states that on or about July 3, 2004, Entergy Arkansas stopped providing hour-ahead operating information about jointly owned units to the non-operating co-owners. Arkansas Electric further states that on June 24, 2004, Arkansas Electric sent a letter on behalf of all the co-owners to Entergy Arkansas protesting Entergy Arkansas' proposed action. Arkansas Electric states that it had several meetings with Entergy Arkansas and other interested parties but there was no resolution of the matter. Arkansas Electric contends that it has not received all the written documentation explaining and supporting the new billing methodology it requested from Entergy Arkansas. Arkansas Electric also explains that Entergy Arkansas made a settlement proposal on August 6, 2004 which Arkansas Electric did not accept.

9. Arkansas Electric states that Entergy Arkansas is not abiding by the terms and conditions of a bargain that Arkansas Electric and Entergy Arkansas struck when Arkansas Electric agreed to buy ownership interests in plants then under construction by Entergy Arkansas. According to Arkansas Electric, each party would shoulder the burdens of ownership of its share of each unit and enjoy the benefits of those units. In addition, Entergy Arkansas was given control of the units and permitted to extract whatever additional system benefits it could from that control, provided only that Arkansas Electric would be credited with energy equivalent to the units' capability. Arkansas Electric states that Entergy Arkansas retains, along with control of the system, significant market information as to how the system is being operated. Arkansas Electric states that this provides Entergy flexibility in the way the units are scheduled. Furthermore, Arkansas Electric states that if there is energy that is more economical than that produced by the units, the units' output can be reduced, and Entergy Arkansas can sell the substitute energy to the co-owners at a profit.

10. Arkansas Electric states that it assumed the risks associated with ownership of the specific assets that it purchased, but not risks associated with Entergy Arkansas' integration of the units into Entergy's system. Arkansas Electric asserts that Entergy Arkansas assumed those risks along with the power to operate the units without regard to Arkansas Electric's system requirements. Arkansas Electric argues that Entergy Arkansas' repricing attempts to shift precisely this kind of risk back to Arkansas Electric. Arkansas Electric states that Entergy Arkansas' actions would severely diminish the value of Arkansas Electric's White Bluff (and ISES) ownership shares.

11. Arkansas Electric contends that the repricing by Entergy Arkansas has resulted in Entergy Arkansas overbilling Arkansas Electric approximately $400,000 for the month of July 2004, approximately $585,000 for the month of August 2004, and approximately $286,000 for the month of September, 2004. Arkansas Electric further claims that Entergy Arkansas' repricing will virtually disable Arkansas Electric from using its ownership shares of White Bluff and ISES to compete with Entergy for sales, and from making sales or purchasing energy in the wholesale market to substitute for energy from those units. Arkansas Electric also claims that Entergy Arkansas is depriving Arkansas Electric of certainty regarding the quantity of its resources and the relationship between its loads, its resources, and the cost to serve its load.

12. Arkansas Electric claims that Entergy Arkansas' unilateral decision to change the price for energy under its contracts is a breach of the Interchange Agreement and the White Bluff and ISES Operating Agreements. Arkansas Electric states that the ISES Operating Agreement entitles Arkansas Electric to energy amounts equal to its ownership share of the units' capability, priced at a rate based upon the units' coal supplies. Arkansas Electric states that section 8.4 of the ISES Operating Agreement provides that when Entergy Arkansas,

> for its own overall system requirements, elect[s] not to schedule Independence SES generation, EAI[1] shall schedule and make available to the other participants energy from other of its resources in accordance with the requirements of each Participant to fully utilize its ownership interest in Independence SES.

13. Arkansas Electric states that the earlier White Bluff Operating Agreement has been treated for billing purposes in precisely the same manner as the ISES Operating Agreement. According to Arkansas Electric the White Bluff Operating Agreement contains provisions entitling each co-owner "to its proportionate share, respectively, of

[1] Entergy Arkansas Inc.

the net capacity and energy of White Bluff Plant," (section 4(a)), and for pricing of energy not actually generated by the White Bluff units but "assumed to be generated at the White Bluff Plant for billing purposes" to make up for under-scheduling of the units (section 2(b)(v)). Arkansas Electric admits that the White Bluff Operating Agreement does not contain a provision corresponding to section 8.4 of the ISES Operating Agreement.

14. Arkansas Electric claims that before July 1, 2004, Entergy Arkansas never deemed the capability of the plants to be only that level at which Entergy Arkansas chose to operate them. Arkansas Electric argues that a party's own interpretation of a provision by its longstanding performance of that provision is telling evidence of what the parties intended so long as that interpretation is not contrary to the words of the contract.[2] Arkansas Electric claims that in a 1993 settlement agreement with Arkansas Electric, Entergy explicitly confirmed "that the Replacement Energy provision of the PCITSA anticipates" that "Replacement Energy is available to Arkansas Electric from AP&L[3] under the PCITSA Article III, section 5 ***only*** to replace generation out of service due to emergency or planned maintenance." Arkansas Electric claims this statement makes clear that Entergy Arkansas is to sell Arkansas Electric replacement energy only when generation plants are out of service due to emergency or planned maintenance. Arkansas Electric states that the Interchange Agreement does not allow Entergy Arkansas to sell Arkansas Electric replacement energy under the broad range of circumstances Entergy Arkansas is now asserting causes it to limit the output of the generation plants.

15. Arkansas Electric claims that Entergy's change in treatment of White Bluff and ISES energy amounts to an impermissible amendment of the agreements. Arkansas Electric argues that neither the ISES Operating Agreement nor the White Bluff Operating Agreement permits unilateral amendment. Arkansas Electric argues that Entergy Arkansas' declaring availability to be actual output effectively eliminates the category of substitute energy. Arkansas Electric states that Entergy Arkansas has told Arkansas Electric that its new interpretation of "availability" only applies to the White Bluff and ISES units, not to Arkansas Electric's gas units subject to Entergy Arkansas' dispatch. Arkansas Electric claims that there is nothing in the Interchange Agreement Article V, section 5 to support any such distinction.

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[2] *See Seminole Electric Cooperative, Inc. v. Florida Power & Light Co*., 53 FERC ¶ 61,026 (1990).

[3] Arkansas Power and Light, which is the predecessor to Entergy Arkansas Inc.

16. According to Arkansas Electric, the bedrock premise of these agreements is that Entergy Arkansas' operation of the units to serve its system needs would sometimes be at odds with the co-owners' interest in a supply of energy constrained only by the operating capability of their assets. Arkansas Electric claims that Entergy Arkansas' exception to its new interpretation for under-scheduling to accommodate its economy purchases only emphasizes the interpretation's destructive effect on the parties' bargain. Arkansas Electric argues that it has no practical, objective means of verifying the purposes of under schedules of White Bluff or ISES. Arkansas Electric argues that the new, higher rate Entergy Arkansas is charging and the changed after-the-fact redispatch practice are at variance with the provisions of the rate schedules on file with this Commission. Arkansas Electric claims that Entergy Arkansas has no legal right to change the redispatch methodology and charge Arkansas Electric these new rates.

17. Arkansas Electric claims that Entergy Arkansas' decision to reduce the provision of information to the co-owners regarding the level of generation from White Bluff and ISES has aggravated the anticompetitive nature of Entergy Arkansas' actions and serves to disadvantage the co-owners, competitors of Entergy Arkansas. Arkansas Electric explains that the system costs are not divided up among the Entergy companies until the end of the month, so Arkansas Electric does not know Entergy's incremental price until after the month is over. Arkansas Electric argues that the lack of price certainty prevents Arkansas Electric from participating in the wholesale market as either a buyer or seller. Arkansas Electric argues that Entergy Arkansas, as agent for Arkansas Electric, owes a fiduciary duty to Arkansas Electric to act in the best interests of Arkansas Electric in connection with the operation of White Bluff and ISES and has legal obligations under the White Bluff and ISES agreements.

18. Arkansas Electric states that Entergy Arkansas' asserted defense relating to Qualifying Facilities (QF) power reveals a potential violation of the Entergy System Agreement by under-allocating QF power purchases to Entergy Arkansas and over-allocating QF power purchases to other Entergy operating companies. Arkansas Electric requests that the Commission revisit the QF power allocation issue and Entergy's potential violation of the Entergy System Agreement.

19. Arkansas Electric claims that Entergy Arkansas' other cited reasons for its change in classifying and pricing energy are indefensible. Arkansas Electric states that Entergy Arkansas has not explained why it needs to back down base load coal units to provide load following service. Arkansas Electric argues that Entergy Arkansas' revival of its longstanding complaint about Arkansas Electric's scheduling of net import transactions with others is another groundless rationalization for trying to limit Arkansas Electric's access to coal-fired energy associated with the capacity that it bought.

III. Notice of Filing, Answer to Complaint, and Pleadings

20. Notice of Arkansas Electric's complaint was published in the *Federal Register*, 69 Fed. Reg. 63,521 with comments, interventions, and protests due on November 17, 2004. The Arkansas Public Service Commission filed a notice of intervention on October 27, 2004. The East Texas Electric Cooperative, Inc. (East Texas) filed a motion to intervene in support and answer in support of motion to consolidate on October 29, 2004. Entergy Arkansas filed an answer to Arkansas Electric's complaint on November 17, 2004. The Arkansas Cities filed a motion to intervene with comments on November 17, 2004.[4] The City Water & Light Plant of the City of Jonesboro, Arkansas (Jonesboro Plant) filed a motion to intervene and comments of November 16, 2004. Arkansas Electric filed an answer to Entergy Arkansas' answer to the complaint on December 2, 2004.

IV. Entergy Arkansas' Answer to Complaint

21. Entergy Arkansas argues that provisions of the Interchange Agreement, specifically Article V and Exhibit E, provide for the consideration of operational constraints in the crediting of energy from the jointly-owned units. Therefore, Entergy Arkansas argues that Arkansas Electric is not to be given credit for energy that is not produced when ISES and White Bluff have to be operated at a less than optimum level due to conditions of the Entergy system. Entergy Arkansas states that the ISES Operating Agreement assigns Entergy Arkansas the responsibility and authority for operation of the ISES units as if they were Entergy Arkansas' units and a part of the Entergy System,[5] and that the co-owners explicitly appointed Entergy Arkansas their agent to effect the operation and maintenance of ISES.[6] Entergy Arkansas contends that section 4.1 of the ISES Operating Agreement requires that each co-owner will pay its proportionate share of all items of cost, and system operational constraints are shared by co-owners. Entergy Arkansas submits that section 8.4 of the Operating Agreement clearly contemplates that the co-owners may not receive their full entitlement share of the output of ISES as the provision states that Entergy Arkansas must use its best efforts to meet the requirements of the co-owners.

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[4] The Arkansas Cities consist of the Conway Corporation, the West Memphis Utilities Commission, and the City of Osceola, Arkansas.

[5] *See* section 3.1.

[6] *See* section 3.2.

22. Similarly, Entergy Arkansas contends that the White Bluff Operating Agreement provides that Entergy Arkansas has the sole authority to manage, control, maintain, and operate the White Bluff Plant. Entergy Arkansas states that the White Bluff Operating Agreement provides for proportional cost-sharing among the co-owners of operational constraints. Entergy Arkansas contends that it is to treat White Bluff as part of the Entergy System and on the same basis as any other generator in the system.

23. Entergy Arkansas contends that when the Entergy control area operator operates and manages the Entergy System, a number of operational factors that are outside of its control can cause imbalances between generation and load. Entergy Arkansas states that the Entergy Arkansas dispatcher must have sufficient unloaded generation that can be turned up or down in response to instantaneous load fluctuations and there is no basis for excluding co-owned resources from being used for this purpose. Entergy Arkansas states that the Entergy Arkansas dispatcher has the obligation to balance the output of IPP generation on the Entergy system, and, to the extent that IPPs do not match the output of their units to their schedules, the Entergy Arkansas dispatcher must balance the unpredictable output by varying the output of the units under its control. Entergy Arkansas asserts that it must contend with the unpredictable nature of schedules for delivery of energy by third-parties into the Entergy System when third-parties, such as Arkansas Electric, schedule energy deliveries into the system.

24. Entergy Arkansas submits that Arkansas Electric seeks to have unfettered access to energy from its ownership interest in the co-owned resources even though Entergy Arkansas may have to turn down a co-owned resource to accommodate delivery of Arkansas Electric's energy from other, off-system resources. Entergy Arkansas asserts that Arkansas Electric significantly contributes to the constrained energy issue due to its load fluctuations, its net energy schedules and the ramping requirements associated with those schedules. Entergy Arkansas maintains that Arkansas Electric is being held responsible for just a small portion of its contribution to energy constraints.

25. Entergy Arkansas states that the Entergy Arkansas dispatcher is obligated to purchase energy provided by QFs interconnected to the Entergy system and the dispatcher must deal with the deliveries from the QFs to the Entergy system. Entergy Arkansas argues that for the Entergy control area operator to accommodate these QF energy deliveries it must keep generation, possibly including co-owned resources, on-line and operating below its maximum output level, and capable of being turned up or turned down in response to these unpredictable deliveries. Entergy Arkansas argues that Arkansas Electric's claim that allocation of QF power to the various operating companies violates the System Agreement is baseless and that Arkansas Electric provides no evidence to backup such a claim. Entergy Arkansas contends that all QF purchases are

made pursuant to the methodology established by the Arkansas Public Service Commission and that the state regulatory commissions set avoided costs for the Entergy System as a whole, not on an operating company-specific basis.

26. Entergy Arkansas asserts that, under the existing Operating Agreements and Interchange Agreement, Arkansas Electric has acknowledged operational constraints and Entergy Arkansas' right to recognize them. Entergy Arkansas insists that the contracts have always allowed for consideration of operational constraints, and Entergy Arkansas did not calculate the effects of operational constraints in the past because the impacts on the operation of the co-owned units did not outweigh the costs for developing a billing mechanism to capture such costs. Entergy Arkansas claims that it is meeting its contractual duties to Arkansas Electric, and consequently Entergy Arkansas is satisfying any fiduciary duty it might have to Arkansas Electric and the other co-owners.

27. Entergy Arkansas claims that Arkansas Electric has not suffered economic harm by the application of the agreements, and that consideration of operational constraints under the agreements is not anticompetitive. Entergy Arkansas also states that the implication that it is not providing Arkansas Electric information that Arkansas Electric needs is unfounded. Entergy Arkansas states that Arkansas Electric, IPPs, other third parties, and QFs do not share with Entergy Arkansas the amount of energy they are scheduling into the Entergy system. Entergy Arkansas explains that this means it has no way of predicting how much generation co-owned or otherwise it will have to turn down in any hour.

28. Entergy Arkansas requests that the Commission deny Arkansas Electric's request to consolidate the instant complaint with the East Texas complaint proceeding in Docket No. EL04-134-000.[7] Entergy Arkansas states that the agreements which are implicated in each proceeding are different and the parties to those contracts are different and consolidation of the cases would only cause more complexity. Entergy Arkansas states that it does not believe that litigation is necessary to resolve this dispute and requests that the Commission set this proceeding for settlement in the event that it does not rule in Entergy Arkansas' favor based on the language in the contracts.

[7] *East Texas Electric Cooperative, Inc. v. Entergy Arkansas, Inc,* 109 FERC ¶ 61,207 (2004).

V. Comments

29. Jonesboro Plant supports Arkansas Electric's motion to consolidate this proceeding with East Texas' complaint in Docket No. EL04-134-000. Jonesboro Plant states that both complaints raise similar, and in some cases, identical claims. Jonesboro Plant states that both complaints seek to have the Commission enforce Entergy Arkansas' contractual obligation to provide substitute energy at the coal equivalency price.

30. Jonesboro Plant claims that Entergy Arkansas has instituted an illegal rate increase in violation of both the ISES and White Bluff agreements. Jonesboro Plant reiterates that the ISES and White Bluff agreements give Jonesboro Plant the right to its proportionate share of energy capacity and requires Entergy Arkansas to use its "best efforts" to assure each co-owner obtains its share. In addition Jonesboro Plant states that Entergy Arkansas has departed from its course of action under both agreements extending over the past 20 years. Jonesboro Plant states that it is requesting the Commission to order Entergy Arkansas to charge all parties to the ISES and White Bluff Operating Agreements only the coal equivalency rate consistent with terms of the agreements.

31. East Texas, a co-owner in ISES Unit 2, states that it filed a complaint against Entergy Arkansas in Docket No. EL04-134-000. East Texas and the Arkansas Cities agree with Arkansas Electric that there are many common issues of law and fact raised by the two complaints against Entergy Arkansas. East Texas and the Arkansas Cities support the motion to consolidate the proceedings to avoid the risk of inconsistent findings, to achieve administrative efficiency, and to enhance the possibility for settlement.

32. The Arkansas Cities, co-owners of both the ISES and White Bluff plants and parties to the ISES and White Bluff Operating Agreements, support Arkansas Electric's complaint. The Arkansas Cities state that under the White Bluff and ISES Operating Agreements each co-owner is entitled to its proportionate share of the net capacity and energy of these units. They state that the pricing of energy of these plants is based upon those plants' coal stockpile price, and the co-owners pay the same price for all energy generated or presumed to be generated by the units. The Arkansas Cities contend that Entergy Arkansas contracted for sole authority in the manner the ISES and White Bluff units were dispatched, with the co-owners receiving substitute energy at the coal price when they were unable to receive their full ownership shares from the units in return.

33. The Arkansas Cities claim that the primary issue in this case is that section 8.4 of the ISES Operating Agreement controls the fact that substitute energy provided to the ISES co-owners should always be priced at the coal stockpile price, regardless of Entergy Arkansas' reasons for changed dispatch of the ISES units. The Arkansas Cities also claim that the history of dealing established that White Bluff was to be treated the same

way. The Arkansas Cities state that the entire reason for the co-owners, including the Arkansas Cities, to enter the ISES and White Bluff Operating Agreements and Ownership Agreements was so that the co-owners would be provided with a low cost coal generation source. The Arkansas Cities state that Entergy Arkansas claims that the reason the Arkansas Cities' substitute energy has not been priced in the same manner as Arkansas Electric's, Jonesboro Plant's, and East Texas' substitute energy was the controlling language in the Arkansas Cities' Interchange Agreements. The Arkansas Cities argue that absent language in the Arkansas Electric, Jonesboro Plant and East Texas Interchange Agreements that would specifically negate or supersede section 8.4 of the ISES Operating Agreement, section 8.4 controls the price of substitute energy for all co-owners.

34. The Arkansas Cities assert that Entergy Arkansas can cite no provisions in either the ISES or White Bluff Operating Agreements or the separate Interchange Agreements to support its primary claim that Entergy Arkansas only "elects" to change the dispatch of ISES only for economic purchases. The Arkansas Cities also assert that Entergy Arkansas has acknowledged that coal-based load capacity in the Entergy system, including ISES and White Bluff, are not prudent resources to use as peaking or load following capacity. Thus, using ISES and White Bluff as anything other than baseload capacity is a very unwise economic decision. The Arkansas Cities state that the relationship between Entergy Arkansas and Entergy Service, Inc. (ESI) has no bearing on the applicability of section 8.4 of the ISES Operating Agreement. The Arkansas Cities insist that Entergy Arkansas' decision to make ESI its agent for scheduling, and ESI's actions in scheduling for the benefit of the entire Entergy system was and is an election for purposes of section 8.4. The Arkansas Cities state that they, like Jonesboro Plant, have no contractual relationship with ESI, but only Entergy Arkansas.

35. The Arkansas Cities agree that Entergy Arkansas is breaching its fiduciary duty to act in the best interest of the co-owners and legal duties under the Operating Agreements. The Arkansas Cities also agree that Entergy Arkansas is attempting an impermissible, unilateral amendment to the Operating Agreements. The Arkansas Cities state that Entergy Arkansas' attempts to reprice the co-owners substitute energy is a violation of the filed rate doctrine.

VI. Discussion

A. Procedural Matters

36. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely unopposed motions to intervene and notice of intervention serve to make the entities that filed them parties to this proceeding.

37. Rule 213(a)(2) (2004), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Arkansas Electric's answer to Entergy Arkansas' answer to the complaint. Therefore we reject it.

B. Analysis

38. We are unable to resolve the complaint summarily because it raises issues of material fact that are best determined in the context of a trial-type evidentiary hearing. More specifically, the parties dispute the contract interpretation involving what rate should be charged when Entergy Arkansas reduces the output of the ISES generation units or the White Bluff generation units due to alleged constraints on its operating system. Accordingly, pursuant to section 206 of the Federal Power Act (FPA),[8] we will set Arkansas Electric's complaint for a trial-type evidentiary hearing and settlement procedures.[9]

39. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after the filing of the complaint, but no later than five months subsequent to the expiration of the 60-day period. Consistent with our general policy,[10] we will set the refund effective date 60 days after the date of the filing of this complaint, *i.e.*, December 24, 2004.

40. Section 206 (b) also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state the best estimate as to when it reasonably expects to make such a decision. Ordinarily, to implement that requirement, we would direct the judge to provide a report to the Commission in advance of the refund effective date. Here, given that the refund effective date will soon pass, the Commission cannot follow its normal procedure.

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[8] 16 U.S.C. § 824e (2000).

[9] We note that the Chief Judge has already appointed a settlement judge in Docket No. EL04-134-000 and that judge will be the settlement judge in the consolidated proceedings (which are consolidated below).

[10] *See, e.g., Seminole Electric Cooperative, Inc. v. Florida Power & Light Company*, 65 FERC ¶ 61,413 at 63,139 (1993) and *Canal Electric Company*, 46 FERC ¶ 61,153 at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

41. Although we do not have the benefit of the judge's report, based on our review of the record we expect that a presiding judge would be able to issue an initial decision within approximately seven months of the commencement of hearing procedures, or, if hearing procedures were to commence immediately, by July 15, 2005. If the presiding judge is able to render a decision within that time, and assuming the case does not settle, we estimate that we will be able to issue our decision with approximately three months of the filing of briefs on and opposing exceptions, or, assuming the case goes to hearing immediately, by December 15, 2005.

42. Due to the fact that the issues raised in this proceeding and those raised in Docket No. EL04-134-000 involve common issues of law and fact, we will consolidate the proceedings for purposes of settlement, hearing and decision.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning the complaint, as discussed in the body of this order. As discussed in the body of this order, we will hold the hearing in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (C) and (D) below.

(B) The settlement or presiding judge, as appropriate, designated in Docket No. EL04-134-000 shall determine the procedures best suited to accommodate the consolidation of the proceedings.

(C) The refund effective date, established pursuant to section 206(b) of the Federal Power Act, is December 24, 2004.

(D) This proceeding is hereby consolidated with the proceeding in Docket No. EL04-134-000.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.